

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

CHER A. D.,<sup>1</sup>

6:20-cv-00439-BR

Plaintiff,

OPINION AND ORDER

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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<sup>1</sup> In the interest of privacy this Court uses only the first name and the initial of the last name of the nongovernmental party in this case. Where applicable, this Court uses the same designation for the nongovernmental party's immediate family member.

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**BROWN, Senior Judge.**

Plaintiff Cher A. D. seeks judicial review of the final decision of the Commissioner of the Social Security Administration (SSA) in which the Commissioner denied Plaintiff's applications for Disability Insurance Benefits (DIB) and Disabled Widow's Benefits (DWB) under Title II of the Social Security Act. This Court has jurisdiction to review the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

For the reasons that follow, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter for the immediate calculation and payment of benefits.

**ADMINISTRATIVE HISTORY**

On April 11, 2017, Plaintiff protectively filed her applications for disability benefits. Tr. 222.<sup>2</sup> In that application Plaintiff alleges a disability onset date of January 1, 1983. Tr. 222. On February 2, 2018, Plaintiff filed an application for disabled widow's benefits. Tr. 229. In that application Plaintiff alleges her husband died on February 14, 2017. Tr. 231. The ALJ states in his Opinion that Plaintiff protectively filed both applications on December 27, 2017, and alleged a disability onset date of February 14, 2017, in both applications. Tr. 13. There is not any information in the record to clarify these discrepancies. Plaintiff, however, appears to concede in her Opening Brief that the disability onset date for both applications is February 14, 2017, for purposes of this Court's review. Pl.'s Br. (#8) at 4.

Plaintiff's applications were denied initially and on reconsideration. An Administrative Law Judge (ALJ) held a hearing on April 30, 2019. Tr. 13, 32-76. Plaintiff and a vocational expert (VE) testified at the hearing. Plaintiff was

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<sup>2</sup> Citations to the official Transcript of Record (#7) filed by the Commissioner on July 16, 2020, are referred to as "Tr."

represented by an attorney at the hearing.

On June 5, 2019, the ALJ issued an Opinion in which he found Plaintiff is not disabled and, therefore, is not entitled to benefits. Tr. 13-24. Plaintiff requested review by the Appeals Council. On January 17, 2020, the Appeals Council denied Plaintiff's request to review the ALJ's decision, and the ALJ's decision became the final decision of the Commissioner. Tr. 1-3. See *Sims v. Apfel*, 530 U.S. 103, 106-07 (2000).

On March 17, 2020, Plaintiff filed a Complaint in this Court seeking review of the Commissioner's decision.

#### **BACKGROUND**

Plaintiff was born on August 28, 1967. Tr. 22, 222. Plaintiff was 49 years old on her alleged disability onset date. Tr. 22. Plaintiff has at least a high-school education. Tr. 22. Plaintiff has past relevant work experience as a sales clerk, cashier II, drama teacher, and administrative clerk. Tr. 22.

Plaintiff alleges disability due to Post-Traumatic Stress Disorder (PTSD), cachexia (a weakness and wasting of the body due to severe chronic illness), migraines, pelvic inflammatory

disease, arthritis, nerve damage in the right foot, and sciatica. Tr. 78-79.

Except as noted, Plaintiff does not challenge the ALJ's summary of the medical evidence. After carefully reviewing the medical records, this Court adopts the ALJ's summary of the medical evidence. See Tr. 16-21.

### **STANDARDS**

The initial burden of proof rests on the claimant to establish disability. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012). To meet this burden, a claimant must demonstrate her inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The ALJ must develop the record when there is ambiguous evidence or when the record is inadequate to allow for proper evaluation of the evidence. *McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir. 2011) (quoting *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001)).

The district court must affirm the Commissioner's decision

if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). See also *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Molina*, 674 F.3d. at 1110-11 (quoting *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009)). "It is more than a mere scintilla [of evidence] but less than a preponderance." *Id.* (citing *Valentine*, 574 F.3d at 690).

The ALJ is responsible for evaluating a claimant's testimony, resolving conflicts in the medical evidence, and resolving ambiguities. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). The court must weigh all of the evidence whether it supports or detracts from the Commissioner's decision. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). Even when the evidence is susceptible to more than one rational interpretation, the court must uphold the Commissioner's findings if they are supported by inferences reasonably drawn from the record. *Ludwig v. Astrue*, 681 F.3d 1047, 1051 (9th Cir. 2012). The court may not substitute its

judgment for that of the Commissioner. *Widmark v. Barnhart*, 454 F.3d 1063, 1070 (9th Cir. 2006).

### **DISABILITY ANALYSIS**

#### **I. The Regulatory Sequential Evaluation**

At Step One the claimant is not disabled if the Commissioner determines the claimant is engaged in substantial gainful activity (SGA). 20 C.F.R. § 404.1520(a)(4)(i). See also *Keyser v. Comm'r of Soc. Sec.*, 648 F.3d 721, 724 (9th Cir. 2011).

At Step Two the claimant is not disabled if the Commissioner determines the claimant does not have any medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1509, 404.1520(a)(4)(ii). See also *Keyser*, 648 F.3d at 724.

At Step Three the claimant is disabled if the Commissioner determines the claimant's impairments meet or equal one of the listed impairments that the Commissioner acknowledges are so severe as to preclude substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(iii). See also *Keyser*, 648 F.3d at 724. The criteria for the listed impairments, known as Listings, are

enumerated in 20 C.F.R. part 404, subpart P, appendix 1 (Listed Impairments)).

If the Commissioner proceeds beyond Step Three, he must assess the claimant's residual functional capacity (RFC). The claimant's RFC is an assessment of the sustained, work-related physical and mental activities the claimant can still do on a regular and continuing basis despite her limitations. 20 C.F.R. § 404.1520(e). See also Social Security Ruling (SSR) 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent schedule." SSR 96-8p, at \*1. In other words, the Social Security Act does not require complete incapacity to be disabled. *Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234-35 (9th Cir. 2011) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

At Step Four the claimant is not disabled if the Commissioner determines the claimant retains the RFC to perform work she has done in the past. 20 C.F.R. § 404.1520(a)(4)(iv). See also *Keyser*, 648 F.3d at 724.

If the Commissioner reaches Step Five, he must determine whether the claimant is able to do any other work that exists in the national economy. 20 C.F.R. § 404.1520(a)(4)(v). See also

Keyser, 648 F.3d at 724-25. Here the burden shifts to the Commissioner to show a significant number of jobs exist in the national economy that the claimant can perform. *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). The Commissioner may satisfy this burden through the testimony of a VE or by reference to the Medical-Vocational Guidelines (or the grids) set forth in the regulations at 20 C.F.R. part 404, subpart P, appendix 2. If the Commissioner meets this burden, the claimant is not disabled. 20 C.F.R. § 404.1520(g)(1).

#### **ALJ'S FINDINGS**

At Step One the ALJ found Plaintiff has not engaged in substantial gainful activity since February 14, 2017, Plaintiff's alleged disability onset date. Tr. 16.

At Step Two the ALJ found Plaintiff has the severe impairments of major depressive disorder; PTSD; history of eating disorder; spine disorder; and disorders of the muscle, ligament, and fascia. Tr. 16.

At Step Three the ALJ concluded Plaintiff's medically determinable impairments do not meet or medically equal one of the listed impairments in 20 C.F.R. part 404, subpart P,

appendix 1. Tr. 16. The ALJ found Plaintiff has the RFC to perform light work. Tr. 18. The ALJ concluded Plaintiff has the ability to understand, to remember, and to carry out short, simple, routine job instructions consistent with unskilled work. Plaintiff can have only occasional cursory interactions with coworkers and the public. Tr. 18.

At Step Four the ALJ concluded Plaintiff is unable to perform her past relevant work. Tr. 22.

At Step Five the ALJ found Plaintiff can perform other jobs that exist in the national economy such as photocopy-machine operator, collator operator, and routing clerk. Tr. 23. Accordingly, the ALJ found Plaintiff is not disabled. Tr. 24.

### **DISCUSSION**

Plaintiff contends the ALJ erred when he (1) failed to provide clear and convincing reasons supported by substantial evidence in the record for discounting Plaintiff's testimony; (2) failed to evaluate properly the medical evidence; (3) improperly adopted the opinions of nonexamining physicians regarding Plaintiff's RFC; and (4) failed to provide legally sufficient reasons for rejecting lay-witness statements.

**I. The ALJ erred when he discounted Plaintiff's subjective testimony regarding her mental-health symptoms.**

Plaintiff contends the ALJ erred when he failed to provide clear and convincing reasons for discounting Plaintiff's testimony.

**A. Standards**

The ALJ engages in a two-step analysis to determine whether a claimant's testimony regarding subjective pain or symptoms is credible. "First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment 'which could reasonably be expected to produce the pain or other symptoms alleged.'" *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)). The claimant need not show his "impairment could reasonably be expected to cause the severity of the symptom [he] has alleged; [he] need only show that it could reasonably have caused some degree of the symptom." *Garrison*, 759 F.3d at 1014 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996)). A claimant is not required to produce "objective medical evidence of the pain or fatigue itself, or the severity thereof." *Id.*

If the claimant satisfies the first step of this

analysis and there is not any affirmative evidence of malingering, "the ALJ can reject the claimant's testimony about the severity of [his] symptoms only by offering specific, clear and convincing reasons for doing so." *Garrison*, 759 F.3d at 1014-15. See also *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) ("[U]nless an ALJ makes a finding of malingering based on affirmative evidence thereof, he or she may only find an applicant not credible by making specific findings as to credibility and stating clear and convincing reasons for each."). General assertions that the claimant's testimony is not credible are insufficient. *Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007). The ALJ must identify "what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)).

## **B. Analysis**

Plaintiff testified she is unable to work because of her "unstable emotions." Tr. 54. Plaintiff testified she "triggers easily" due to a history of abuse and PTSD, and she gets upset and angry. Tr. 54. Plaintiff also asserts she has systemic sclerosis, scar tissue in her spine and neck, and long-

term depression. Tr. 54-55, 57. She contends she has difficulty using her hands to grasp and her systemic sclerosis causes her to have a lot of pain and shortness of breath. Tr. 19, 55.

The ALJ concluded Plaintiff's medically determinable impairments could reasonably be expected to cause Plaintiff's alleged symptoms. Tr. 19. The ALJ, however, found Plaintiff's statements concerning the intensity, persistence, and limiting effects of her symptoms are inconsistent with the medical evidence and other evidence in the record. Tr. 19. For example, on June 18, 2017, Tanja Kujac, M.D., performed a consultative physical examination of Plaintiff. Tr. 390-94. Dr. Kujac reported Plaintiff does not have any postural, manipulative, or environmental limitations; she is able to stand and to walk for up to six hours; and she does not have any limitation as to her sitting capacity. Tr. 394. Dr. Kujac also noted Plaintiff easily walked into the examination room, was able to sit in the examination chair, and was able to briskly transfer from the chair to the examination table and back. Tr. 391.

On this record the Court concludes the ALJ provided

legally sufficient reasons for discounting Plaintiff's allegations regarding her physical limitations.

The ALJ, however, did not provide clear and convincing reasons for discounting Plaintiff's subjective testimony regarding her mental-health symptoms. The ALJ concluded Plaintiff was "treated conservatively with therapy, mindfulness meditation, and yoga, and she declined to take medications" (Tr. 20), but the record does not support this reasoning. For example, in December 2017 Plaintiff told her provider at the White Bird Medical Clinic that she wanted "to try counseling and natural/holistic remedies as opposed to medications for treatment." Tr. 406. Plaintiff, however, was later prescribed medications, which she took for her anxiety. Tr. 559-60. The ALJ acknowledged Plaintiff's use of medications, but he stated Plaintiff discontinued their use "despite their efficacy with controlling her symptoms." Tr. 21. Although Plaintiff stopped taking her medications in February 2019, the record reflects it was only because she broke up with her boyfriend and she left the house without her medications. Tr. 533. She later obtained new prescriptions and resumed taking her medications. Tr. 537. The record, however, reflects Plaintiff continued to experience

anxiety, nightmares, anger, and mood swings despite taking her medications. Tr. 537, 578.

The ALJ also discounted Plaintiff's testimony based on Plaintiff's daily activities. The ALJ noted Plaintiff "is able to prepare simple meals, shower daily, maintain friendships, use public transportation without assistance, shop, do her laundry by hand, use a computer, read, make art, and complete all household chores." Tr. 20. The record, however, reflects on June 22, 2017, Plaintiff reported to Pamela Roman, M.D., during a psychodiagnostic assessment that Plaintiff "tries" to shower every day, and she only "knows how" to do household chores. Tr. 397. Although Plaintiff reported she goes grocery shopping, she stated she may break down and sit on the floor crying while shopping. Tr. 56-57. Plaintiff also needs reminders to take her medications and encouragement to attend to her personal care. Tr. 295. Guthrie Crawford, a friend, reports Plaintiff gets upset, has outbursts, and "just leaves" when stressed. Tr. 327-32. George Rode, another acquaintance, described Plaintiff as a "[v]ery sweet person until something goes wrong or not expected," and then Plaintiff starts to "tense up," to quiver, to raise her voice, and "get[s] close to abusive."

Tr. 376. Doyle Shaw, another friend, described Plaintiff as a "really nice person" until she has a PTSD episode and starts crying. Tr. 374. Jon Correll, another friend, also stated Plaintiff has frequent episodes at night, wakes up in tears, and "will jump in her car and leave, spending the night in her car crying." Tr. 360. Dr. Roman noted Plaintiff was observed weeping while completing the forms for her evaluation. Tr. 398. Plaintiff cites to numerous instances in the record that reflect her tearfulness and crying in front of medical professionals. See Pl.'s Br. (#8) at 24.

On this record the Court concludes the ALJ erred when he discounted Plaintiff's testimony regarding her mental-health symptoms and failed to provide legally sufficient reasons supported by substantial evidence in the record for doing so.

**II. The ALJ erred in his evaluation of the medical opinions of Dr. Roman and Zac Schwartz, Ph.D., a treating psychologist.**

Plaintiff contends the ALJ failed to evaluate properly the "persuasiveness" of the medical opinions of Dr. Schwartz, Plaintiff's treating psychologist, and Dr. Roman, an examining psychologist.

**A. Standards**

The Court notes the regulations regarding evaluation

of medical evidence have been amended and several of the prior Social Security Rulings, including SSR 96-2p, have been rescinded for claims protectively filed after March 27, 2017. The new regulations provide the Commissioner "will no longer give any specific evidentiary weight to medical opinions; this includes giving controlling weight to any medical opinion." *Revisions to Rules Regarding the Evaluation of Medical Evidence (Revisions to Rules)*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68 (Jan. 18, 2017). See 20 C.F.R. § 404.1520c(a). Instead the Commissioner must consider all medical opinions and "evaluate their persuasiveness" based on "supportability" and "consistency" using the factors specified in the regulations. 20 C.F.R. § 404.1520c(c). Those factors include "supportability," "consistency," "relationship with the claimant," "specialization," and "other factors." *Id.* The factors of "supportability" and "consistency" are considered to be "the most important factors" in the evaluation process. *Id.* See also *Revisions to Rules*, 82 Fed. Reg. 5844.

In addition, the regulations change the way the Commissioner should articulate his consideration of medical opinions.

First, we will articulate our consideration of medical opinions from all medical sources regardless of whether the medical source is an AMS [Acceptable Medical Source]. Second, we will always discuss the factors of supportability and consistency because those are the most important factors. Generally, we are not required to articulate how we considered the other factors set forth in our rules. However, when we find that two or more medical opinions . . . about the same issue are equally well-supported and consistent with the record but are not exactly the same, we will articulate how we considered the other most persuasive factors. Third, we added guidance about when articulating our consideration of the other factors is required or discretionary. Fourth, we will discuss how persuasive we find a medical opinion instead of giving a specific weight to it. Finally, we will discuss how we consider all of a medical source's medical opinions together instead of individually.

*Revisions to Rules*, 82 Fed. Reg. 5844.

Although the regulations eliminate the "physician hierarchy," deference to specific medical opinions, and assigning "weight" to a medical opinion, the ALJ must still "articulate how [he/she] considered the medical opinions" and "how persuasive [he/she] find[s] all of the medical opinions." 20 C.F.R. § 404.1520c(a) and (b)(1). The ALJ is required to "explain how [he/she] considered the supportability and consistency factors" for a medical opinion. 20 C.F.R. § 404.1520c(b)(2). Accordingly, the court must evaluate whether

the ALJ properly considered the factors as set forth in the regulations to determine the persuasiveness of a medical opinion.

## **B. Analysis**

### **1. Dr. Roman**

On June 22, 2017, Dr. Roman, an examining psychologist, performed a Psychodiagnostic Assessment of Plaintiff. Tr. 395-402. Dr. Roman diagnosed Plaintiff with PTSD, major depressive disorder, child and adult abuse, and mild neurocognitive disorder from a traumatic brain injury. Tr. 400. Dr. Roman concluded Plaintiff is able to understand and to remember simple instructions and might be able to understand and to remember more complicated instructions in a supportive setting. Tr. 400. Dr. Roman noted Plaintiff was applying for Social Security benefits, which suggests that she can manage to recall instructions at least intermittently. Tr. 400. Dr. Roman, however, noted Plaintiff's possible head trauma could affect Plaintiff's ability to understand and to remember complex instructions. Tr. 400. Based on her examination, Dr. Roman also concluded Plaintiff would not be able to maintain attention and concentration on even a part-time basis without decompen-

sating and being extremely distracting to others. Tr. 401.

The ALJ concluded Dr. Roman's diagnosis of PTSD and depression was consistent with Plaintiff's treatment history. Tr. 20. The ALJ, however, found Dr. Roman's diagnosis of neurocognitive brain disorder "not persuasive" on the ground that it was based primarily on Plaintiff's self-report of injury without corroborating medical evidence. Tr. 20.

The partial reliance on a claimant's self-reported symptoms does not provide a reason to reject a psychiatrist's opinion. *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017). Here Dr. Roman conducted a clinical interview, documented a mental-status examination, and administered four objective tests. Accordingly, the ALJ's conclusion that Dr. Roman "relied heavily" on Plaintiff's self-report is not consistent with or supported by the record.

The ALJ also found Dr. Roman was unaware that Plaintiff had worked for her husband's business before and after her alleged head injury, and, therefore, Dr. Roman's conclusion that Plaintiff was unable to perform even part-time work was not persuasive. Tr. 20.

Plaintiff, however, points out that Dr. Roman was

aware that Plaintiff had worked for her husband as noted in

Dr. Roman's report:

[Plaintiff] worked with last her husband (sic) who did taxes, saying she took care of the mail, talked to people and cleaned his office. After his stroke he was somewhat paralyzed and so she had to drive him places. She said she was not a bookkeeper so much as his assistant. . . .

[On testing Plaintiff] could do simple addition, subtraction and multiplication but made simple errors such as answering  $9+7=17$  and  $17-9=12$ . This is unusual given her self-report that she helped her husband do taxes.

Tr. 396, 399. Plaintiff contends the ALJ misread Dr. Roman's report, and, therefore, his rejection of Dr. Roman's opinion is not supported by substantial evidence in the record. The Court agrees.

On this record the Court concludes the ALJ erred when he discounted Dr. Roman's medical opinion because the ALJ did not provide legally sufficient reasons supported by substantial evidence in the record for doing so.

## **2. Dr. Schwartz**

Dr. Schwartz was Plaintiff's treating mental-health provider from April 2018 through April 2019. Tr. 655-58. On March 5, 2019, Dr. Schwartz completed a Mental Residual

Functional Capacity Assessment of Plaintiff. Tr. 646-51. In a letter accompanying his assessment Dr. Schwartz noted:

[Plaintiff] clearly suffers extreme symptoms of PTSD and anxiety that stems from a hoist (*sic*) of developmental traumas and exacerbated by current situations. While she is very bright and talented and can function at moments, she is completely unable to seek or maintain regular employment as her mood swings and symptoms would prevent her from the minimal amount of reliability and stability necessary [to] maintain such employment.

While she is making progress in treatment, she will not gain the stability and reliability necessary for sustainable employment in the foreseeable future.

Tr. 651. Dr. Schwartz opined Plaintiff has moderate limitations in her ability to understand and to remember short and simple instructions, to sustain an ordinary routine without special supervision, to make simple work-related decisions, and to ask simple questions or request assistance. He opined Plaintiff has moderately severe limitations in her ability to remember locations and work-like procedures; to understand, to remember, and to carry out detailed instructions; to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness; to respond appropriately to changes in the work setting; and to be aware of normal hazards and to take

appropriate precautions. Dr. Schwartz also opined Plaintiff has severe limitations in her ability to maintain attention and concentration for extended periods; to perform activities within a schedule, to maintain regular attendance, and to be punctual; to work in coordination with or in proximity to others without being distracted; to complete a normal workday or workweek without interruptions caused by her psychological symptoms; to perform at a consistent pace without an unreasonable number and length of rest periods; to interact with the general public; to accept instructions and to respond appropriately to criticism from supervisors; to get along with coworkers or peers; to travel in unfamiliar places or use public transportation; and to set realistic goals or to make plans independently of others. Tr. 647-49.

The ALJ found Dr. Schwartz's opinion "not persuasive" on the ground that it is "wholly inconsistent with his own progress notes" and the "reaming medical evidence" and that Dr. Schwartz's treatment notes consistently show Plaintiff was making "steady progress." Tr. 21. The ALJ also asserted Plaintiff described "a variety of daily tasks she is able to complete independently." In addition, the ALJ found even though

Plaintiff's emotional responses to stress are consistent with her diagnosis, "she has not received the level of treatment one would see with an individual experiencing disabling psychological symptomatology resulting in a lack of employability at any level." Tr. 21.

As noted, the ALJ is required to apply five factors to determine the persuasiveness of a medical opinion: (1) supportability; (2) consistency with other evidence in the record; (3) the medical sources' relationship with the claimant including length, frequency, and extent of treatment; (4) the medical source's area of specialization; and (5) other factors including familiarity with other evidence and the requirements of the disability program. 20 C.F.R. § 404.1520. Supportability and consistency are considered the most important factors. 20 C.F.R. § 404.1520c(c).

**a. Dr. Schwartz's Treatment Notes**

A conflict between a treating doctor's opinion and his treatment notes may provide a reason to discredit his opinion. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014). Treatment notes indicating the patient has improved, however, must be read "in context of the overall diagnostic picture" and

"do[] not mean that the person's impairment no longer seriously affects her ability to function in the workplace." *Holohan v. Massanari*, 246 kF.3d 1195, 1205 (9th Cir. 2001).

Here the ALJ disregarded "the context" of Dr. Schwartz's treatment notes that support disability. At the start of his treatment in April 2018 Dr. Schwartz described Plaintiff's symptoms as anxiety, sleep disruption, hyper-vigilance, intrusive memories, and placing herself in dangerous situations. Tr. 655. Although Dr. Schwartz consistently described Plaintiff's progress as "good," "very good," and even "excellent," his records also describe the context of Plaintiff's condition. For example, on May 1, 2018, in his notes Dr. Schwartz reported Plaintiff was very emotional and "hair trigger" (Tr. 656); in June 2018 Plaintiff was "venting mistakes and [the] urge to put herself in harms way" (Tr. 656); in July 2018 Plaintiff was doing "lots of venting" (Tr. 656); in August 2018 Plaintiff was feeling more optimistic but still "shaky" (Tr. 656); in September 2018 Plaintiff expressed "confusion and frustration with self . . . unable and not worth it" (Tr. 657); in October 2018 Plaintiff shared "lots of moments of 'post trauma'" that triggered panic attacks (Tr. 657); in

December 2018 Plaintiff needed to work on internal conflict resolution and behavioral choices (Tr. 657); in January 2019 Plaintiff was "freaking out" over "little things" and "'packing to leave' syndrome'" (Tr. 657-58); and in her final session in February 2019 Plaintiff reported she was "very unhappy, [in] relationship crisis, waking up feeling 'bizarre' and angry" (Tr. 658).

Based on this record the Court concludes the ALJ erred when he concluded Dr. Schwartz's opinion was inconsistent with his treatment notes.

**b. Level of Treatment**

The ALJ also discounted Dr. Schwartz's opinion on the ground that Plaintiff "has not received the level of treatment one would see with an individual experiencing disabling psychological symptomatology resulting in a lack of employ-ability on any level." Tr. 21. The ALJ, however, did not offer any evidence or explanation to support this conclusion.

Because the ALJ's conclusion is not supported by or consistent with the record, the Court concludes the ALJ erred when he discounted Dr. Schwartz's opinion based on an

insufficient level of treatment.

**c. Psychosocial Stressors**

The ALJ also discounted Dr. Schwartz's opinion on the ground that a progress note on March 19, 2019, by Dana O'Mary, F.N.P., Plaintiff's primary-care provider, stated Plaintiff's psychological symptoms stem from psychosocial stressors rather than acute episodes of depression, anxiety, or PTSD triggers. Tr. 21, 533.

F.N.P. O'Mary, however, noted Plaintiff has a history of PTSD ("3 dead husbands," a breakup with her boyfriend who had "psychological problems," and arguments with friends), and Plaintiff reported "worsening anxiety attacks with the recent stressors." Tr. 533. Notably, this record is after Dr. Schwartz's assessment of Plaintiff's limitations on March 5, 2019, and, therefore, they do not constitute a legitimate conflict with Dr. Schwartz's opinion. Plaintiff asserts it is reasonable to conclude these stressors made Plaintiff's symptoms worse rather than creating them. The Court agrees.

On this record the Court concludes the ALJ erred when he discounted the persuasiveness of Dr. Schwartz's medical opinion based on a conflict with the progress note by

F.N.P. O'Mary.

In summary, the Court concludes the ALJ erred in his evaluation of the persuasiveness of the medical opinions of Drs. Roman and Schwartz under the new regulations.

**III. The ALJ did not provide legally sufficient reasons for adopting the nonexamining physicians' assessments of Plaintiff's RFC.**

Plaintiff contends the ALJ erred when he adopted the opinions of nonexamining, state-agency medical consultants Martin Kehrli, M.D.; Ben Kessler, Psy.D.; Thomas Davenport, M.D.; and Scott Kaper, Ph.D.

**A. Standards**

As noted, the Commissioner "will no longer give any specific evidentiary weight to medical opinions; this includes giving controlling weight to any medical opinion." *Revisions to Rules Regarding the Evaluation of Medical Evidence (Revisions to Rules)*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68 (Jan. 18, 2017). See 20 C.F.R. § 404.1520c(a). Instead the Commissioner must consider all medical opinions and "evaluate their persuasiveness" based on "supportability" and "consistency" using the factors specified in the regulations. 20 C.F.R. § 404.1520c(c).

**B. Analysis**

On July 5, 2017, Dr. Kessler diagnosed Plaintiff with bipolar disorder, depression, and PTSD. He assessed Plaintiff's mental RFC and concluded Plaintiff has the ability to remember and to understand only simple instructions; can carry out and maintain concentration, persistence, and pace for only simple tasks; is limited to cursory contact with coworkers; and is limited to only occasional contact with the general public. Tr. 88-89.

On July 6, 2017, Dr. Kehrli assessed Plaintiff's physical RFC and concluded Plaintiff is limited to medium work; can only lift and carry 50 pounds occasionally and 25 pounds frequently; can stand and/or walk for six hours in an eight-hour workday; and can sit for six hours in an eight-hour workday. Tr. 86-87.

On February 6, 2018, Dr. Kaper issued an evaluation of Plaintiff's mental RFC (Tr. 120-22) that is identical to Dr. Kessler's evaluation. On the same date Dr. Davenport issued an evaluation of Plaintiff's physical RFC (Tr. 103-04) that is also identical to Dr. Kehrli's evaluation.

The ALJ adopted the assessments of the nonexamining

consultants, but he limited Plaintiff to light work rather than medium work. Tr. 22. The ALJ noted:

The State agency consultants are highly qualified medical sources who are also experts in the evaluation of medical issues in disability claims under the Act. The regulations provide that treating and examining relationships are more persuasive than nonexamining relationships by nature. [Citation omitted]. However, the State agency examiners have familiarity with the medical evidence and an understanding of the disability program's policies, and evidentiary requirements such that appropriate consideration has been given to their determinations.

Tr. 22. The Commissioner contends the ALJ satisfied the articulation requirements when he found the state-agency opinions "understated" Plaintiff's physical limitations and were not persuasive. Def.'s Br. at 15.

The articulation requirements of the new regulations provide the Agency will "explain how we considered the supportability and consistency factors for a medical source's opinions or prior administrative medical findings in your determination or decision." 20 C.F.R. § 404.1520c(b)(2). The ALJ, however, stated only that he adopted the state-agency doctor's opinions because they "are highly qualified" and "have familiarity with the medical evidence and . . . the disability program's policies." Tr. 22. In addition, the ALJ did not

provide any explanation as to how the objective medical evidence supported the nonexamining doctors' opinions or why their opinions were consistent with the evidence.

Accordingly, on this record the Court concludes the ALJ failed to provide legally sufficient reasons for adopting the opinions of Drs. Kehrli, Davenport, Kessler, and Kaper regarding Plaintiff's RFC.

**IV. The ALJ failed to provide legally sufficient reasons for discounting the statements of the lay witnesses.**

Plaintiff contends the ALJ erred when he failed to provide legally sufficient reasons for rejecting the lay-witness statements of Guthrie Crawford, Jon Correll, George Rode, and Doyle Shaw, Plaintiffs' friends, and Jon S., Plaintiff's brother, regarding Plaintiff's symptoms.

**A. Standards**

Lay-witness testimony regarding a claimant's symptoms is competent evidence that the ALJ must consider unless he "expressly determines to disregard such testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). The ALJ's reasons for rejecting lay-witness testimony must also be "specific." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir.

2006). Germane reasons for discrediting a lay-witness's testimony include inconsistency with the medical evidence and the fact that the testimony "generally repeat[s]" the properly discredited testimony of a claimant. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005). See also *Williams v. Astrue*, 493 F. App'x 866 (9th Cir. 2012).

The ALJ is not required, however, "to discuss every witness's testimony on a[n] individualized, witness-by-witness basis. Rather, if the ALJ gives germane reasons for rejecting testimony by one witness, the ALJ need only point to those reasons when rejecting similar testimony by a different witness." *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012). Although the ALJ must consider evidence from nonmedical sources pursuant to § 404.1520c(d) of the new regulations, the ALJ is "not required to articulate how [he] consider[s] evidence from nonmedical sources" and he does not have to use the same criteria as required for medical sources. The regulations, however, do not eliminate the need for the ALJ to articulate his assessment of the lay-witness statements.

## **B. Analysis**

Crawford reports Plaintiff gets upset, has outbursts,

and "just leaves" when stressed. He noted Plaintiff gets upset when she cannot remember things and has outbursts that she has a hard time controlling. Tr. 327-32. Rode described Plaintiff as a "[v]ery sweet person until something goes wrong or not expected," and then Plaintiff starts to "tense up," quiver, raises her voice, and "get[s] close to abusive." Tr. 376. Shaw described Plaintiff as a "really nice person" until she has a PTSD episode and starts crying. Tr. 374. Correll also stated Plaintiff has frequent episodes at night, wakes up in tears, and "will jump in her car and leave, spending the night in her car crying." Tr. 360. Jon S., Plaintiff's brother, noted the stress and abuse that he and Plaintiff went through as children, but he described Plaintiff as a "very good person overall." Tr. 372.

The ALJ "considered the supportive statements and observations . . . concerning [Plaintiff's] impairments and associated decreased work capacity" when assessing Plaintiff's RFC. Tr. 22. The Commissioner contends these statements "mirrored" Plaintiff's symptom testimony, and the ALJ reasonably gave more weight to the objective medical evidence than to the lay-witness statements.

The ALJ ultimately concluded the lay-witness statements are "neither inherently valuable or persuasive when compared to the objective medical evidence" (Tr. 22), but he did not provide an assessment of the lay-witness statements. As noted, although the ALJ is not required to use the same factors as required for medical sources, he is still required to articulate his analysis and his reasons for discounting such statements. *See Joseph R. v. Comm'r of Soc. Sec.*, No. 3:18-cv-01779-BR, 2019 WL 4279027, at \*12 (D. Or. Sept. 10, 2019).

On this record the Court concludes the ALJ erred when he failed to articulate his reasons for discounting the lay-witness statements.

#### **REMAND**

The decision whether to remand for further proceedings or for payment of benefits generally turns on the likely utility of further proceedings. *Carmickle*, 533 F.3d at 1179. The court may "direct an award of benefits where the record has been fully developed and where further administrative proceedings would serve no useful purpose." *Smolen*, 80 F.3d at 1292.

The Ninth Circuit has established a three-part test "for

determining when evidence should be credited and an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). The court should grant an immediate award of benefits when

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

*Id.* The second and third prongs of the test often merge into a single question: Whether the ALJ would have to award benefits if the case were remanded for further proceedings. *Id.* at 1178 n.2.

As noted, the Court has concluded the ALJ erred when he failed to provide legally sufficient reasons supported by substantial evidence in the record for discounting Plaintiff's testimony regarding her mental-health symptoms, for discounting the persuasiveness of the medical opinions of Drs. Roman and Schwartz regarding Plaintiff's limitations, for adopting the opinions of the state-agency nonexamining physicians over those of the treating and examining physicians, and for failing to articulate his reasons for discounting the lay-witness

statements. Thus, the Court concludes consideration of the record as a whole establishes that the ALJ would be required to find Plaintiff disabled and to award benefits to Plaintiff if this evidence is credited.

Accordingly, the Court remands this matter for the immediate calculation and payment of benefits.

#### **CONCLUSION**

For these reasons, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 42 U.S.C. § 405(g) for the immediate calculation and payment of benefits.

IT IS SO ORDERED.

DATED this 12th day of February, 2021.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States Senior District Judge